IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)	
Petitioner,	)	
vs.	)	**No. 84454**
AL LUEBBERS,	)	
Respondent.	)	

Brief on Petition for Original Writ of Habeas Corpus
To the Missouri Supreme Court

PETITIONER'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Christopher Simmons was convicted after a trial by jury in the Jefferson County Circuit Court in Missouri of murder in the first degree, under §565.020.1 RSMo. The date of judgment and conviction was August 19, 1994. The current action before the Court originated when Mr. Simmons filed a petition for writ of habeas corpus in this Court challenging the legality of his sentence of death. Pursuant to Missouri Supreme Court Rule 91.02(b), this Court has original jurisdiction over the petition because Mr. Simmons is under a sentence of death. Furthermore, because the punishment imposed in this case was death, this Court has exclusive appellate jurisdiction. Article V, Section 3, Mo. Const. (amended 1982).

STATEMENT OF FACTS

On September 9, 1993, the body of Shirley Crook was found in the Meramec River in St. Louis County. On September 10, 1993, 17-year-old[1] Christopher Simmons was arrested at his high school for the crime. His trial on the charge of first degree murder began on June 13, 1994. The jury returned a verdict of guilty and the penalty phase to determine punishment took place on June 17, 1994. The jury returned a sentence of death, finding the following aggravating circumstances to support such sentence: 1) murder for money, 2) murder to prevent lawful arrest, and 3) depravity of mind. The trial court sentenced Chris Simmons to death on August 19, 1994.

Mr. Simmons filed his pro se Motion to Vacate, Set Aside, or Correct the Judgment or Sentence on January 17, 1995. Appointed counsel filed a first amended motion and request for an evidentiary hearing on March 24, 1995. An evidentiary hearing was held on the motion on August 18, October 6, 23-24, and November 1, 1995. That motion was denied by the trial court on January 3, 1996.

Mr. Simmons filed a notice of appeal with this Court on February 7, 1996. This Court affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). A motion for rehearing was denied on May 27, 1997. Mr. Simmons then petitioned the United States Supreme

[1] Christopher Simmons was born on April 26, 1976.

Court for certiorari on July 2, 1997. The Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997).

Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. That petition, and two motions for reconsideration, was finally denied on September 28, 1999. Mr. Simmons appealed the denial of his petition to the Eighth Circuit Court of Appeals. The Court of Appeals denied relief in ***Simmons v. Bowersox***, 235 F.3d 1124 (8th Cir. 2001). Mr. Simmons sought certiorari review before the United States Supreme Court. The Court denied the petition for certiorari on October 1, 2001.

This Court set an execution date of May 1, 2002, and then reset the date for June 5, 2002. On May 3, 2002, Mr. Simmons filed a petition for writ of habeas corpus with this Court, alleging that his death sentence was illegal because he was a juvenile at the time of his crime. This is the first time Mr. Simmons raised this objection before any court. On May 28, 2002, this Court stayed petitioner's execution pending the United States Supreme Court's decision in ***Atkins v. Virginia***. Following that decision, this Court ordered that the parties file suggestions as to how ***Atkins*** applied to Mr. Simmons' case. On November 26, 2002, this Court issued a Writ of Habeas Corpus, which prompted the briefing that follows.

POINT RELIED ON

CHRISTOPHER SIMMONS IS ENTITLED TO A WRIT OF HABEAS CORPUS RELIEVING HIM FROM HIS SENTENCE OF DEATH BECAUSE THE EIGHTH AND FOURTEENTH AMENDMENTS, AS WELL AS ARTICLE 1, SECTION 21 OF THE MISSOURI CONSTITUTION, AS INTERPRETED BY SOCIETY'S "EVOLVING STANDARDS OF DECENCY," RENDER THE EXECUTION OF JUVENILES CRUEL AND UNUSUAL PUNISHMENT IN THAT REVIEW OF THOSE FACTORS DETERMINED TO BE BENCHMARKS OF CURRENT "STANDARDS OF DECENCY" BY THE COURT IN ***ATKINS V. VIRGINIA*** SHOWS THAT (1) JUVENILES, AS A CLASS, DO NOT POSSESS THE LEVEL OF CULPABILITY REQUIRED TO BE ELIGIBLE FOR THE DEATH PENALTY, (2) THERE IS A SIGNIFICANT TREND AGAINST EXECUTING JUVENILES IN THIS COUNTRY, (3) EXPERT AND RELIGIOUS ORGANIZATIONS OPPOSE JUVENILE EXECUTIONS, (4) PUBLIC OPINION WEIGHS HEAVILY AGAINST SUCH EXECUTIONS, AND (5) INTERNATIONAL NORMS PRECLUDE THE EXECUTION OF JUVENILES.

Atkins v. Virginia, 122 S.Ct. 2242 (2002)

Calderon v. Thompson, 523 U.S. 538 (1998)

Sawyer v. Whitley, 505 U.S. 333 (1992)

Michael Domingues, United States, Inter-American Commission on Human Rights, Organization of American States, Report No. 62/02, Merits Case 12.285 (October 22, 2002)

Eighth Amendment, United States Constitution

Article 1, Section 21, Missouri Constitution

Missouri Supreme Court Rule 91.01(b)

ARGUMENT

CHRISTOPHER SIMMONS IS ENTITLED TO A WRIT OF HABEAS CORPUS RELIEVING HIM FROM HIS SENTENCE OF DEATH BECAUSE THE EIGHTH AND FOURTEENTH AMENDMENTS, AS WELL AS ARTICLE 1, SECTION 21 OF THE MISSOURI CONSTITUTION, AS INTERPRETED BY SOCIETY'S "EVOLVING STANDARDS OF DECENCY," RENDER THE EXECUTION OF JUVENILES CRUEL AND UNUSUAL PUNISHMENT IN THAT REVIEW OF THOSE FACTORS DETERMINED TO BE BENCHMARKS OF CURRENT "STANDARDS OF DECENCY" BY THE COURT IN ***ATKINS V. VIRGINIA*** SHOWS THAT (1) JUVENILES, AS A CLASS, DO NOT POSSESS THE LEVEL OF CULPABILITY REQUIRED TO BE ELIGIBLE FOR THE DEATH PENALTY, (2) THERE IS A SIGNIFICANT TREND AGAINST EXECUTING JUVENILES IN THIS COUNTRY, (3) EXPERT AND RELIGIOUS ORGANIZATIONS OPPOSE JUVENILE EXECUTIONS, (4) PUBLIC OPINION WEIGHS HEAVILY AGAINST SUCH EXECUTIONS, AND (5) INTERNATIONAL NORMS PRECLUDE THE EXECUTION OF JUVENILES.

I. Mr. Simmons' Claim is Not Procedurally Barred

Rule 91.01 allows any person restrained of liberty to petition for a writ of habeas corpus. Missouri Supreme Court Rule 91.01(b). Courts are not required,

however, to issue the writ "where other remedies are adequate and available." ***State ex rel. Simmons v. White***, 866 S.W.2d 443, 446 (Mo. banc 1993). Respondent's Return claims that other remedies were available and not pursued in Mr. Simmons' postconviction motion and direct appeal to this Court, thereby making the issue procedurally defaulted and barred from review in a Rule 91 habeas petition.[2] The Return also alleges that Mr. Simmons makes no attempt to demonstrate that his defaulted claim is reviewable under Rule 91.[3] To the contrary, Mr. Simmons made a nearly verbatim argument to the one that follows here in his Reply to Respondent's' Supplemental Suggestions in Opposition to Petition for Writ of Habeas Corpus once respondent raised the issues of procedural default.

While Mr. Simmons recognizes that he did not raise the issue now before the Court in his previous direct and postconviction appeals, the issue is not procedurally barred from consideration by this Court because Mr. Simmons can show "cause and prejudice" for failure to raise the issue, and can show that "manifest injustice" will result if habeas corpus relief is not granted. Under Missouri law, Mr. Simmons is entitled to have his claim decided in a habeas corpus action if he can show either "cause and prejudice" or "manifest injustice"

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[2] *See* respondent's "Return" to this Court's Writ of Habeas Corpus, p. 5.

[3] *See* Return, p. 5.

for failing to present the claim at an earlier opportunity. Following federal law, the Missouri Court adopted this definition of the "cause and prejudice" standard:

> [T]he petitioner can avoid the procedural default by showing *cause* for the failure to timely raise the claim at an earlier juncture and *prejudice* resulting from the error that forms the basis of the claim. The "cause" of procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. To establish "prejudice", the petitioner must show that the error he asserts worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

Covey v. Moore, 72 S.W.3d 204, 210-211 (Mo. App. W.D. 2002) (quoting ***Brown v. State***, 66 S.W.3d 721, 726 (Mo. banc 2002)).

Likewise adopting federal law, this Court has defined "manifest injustice" to require a showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." ***Clay v. Dormire***, 37 S.W.3d 214 (Mo. banc 2000) (quoting ***Schlup v. Delo***, 513 U.S. 298, 327 (1995)). The standard for determining "actual innocence" depends on whether the claim asserts actual innocence of the crime, or actual innocence of the death penalty. Respondent errs in mixing the two standards and in asserting that because Mr.

Simmons cannot show factual innocence of the crime or lack of any aggravating circumstances he cannot show actual innocence of the death penalty.[4]

In making the distinction between the two standards, the Court in ***Calderon v. Thompson***, 523 U.S. 538, 559-60 (1998) stated as follows:

> Although demanding in all cases, the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought by the habeas petitioner. If the petitioner asserts his actual innocence of the underlying crime, he must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in his habeas petition. . . . If, on the other hand, a capital petitioner challenges his death sentence in particular, he must show "by clear and convincing evidence" that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. . . .

Id. (citations omitted).[5] In its discussion of the standard of review, respondent

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[4] *See* Return, pp. 4, 9-10.

[5] In ***Embrey v. Hershberger***, 131 F.3d 739, 40-41 (8th Cir. 1997), the court recognized the distinction, originally articulated in ***Sawyer v. Whitley***, 505 U.S. 333 (1992), in the two definitions of actual innocence.

incorrectly asserts the standard applicable for claims of factual innocence.[6] That standard is simply irrelevant here, as Mr. Simmons claims actual innocence of the death penalty, not the underlying crime.

In its analysis, respondent asserts that "[p]etitioner cannot establish factual innocence" and that petitioner has not claimed actual innocence of the crime or of the death penalty, therefore making the manifest injustice exception inapplicable.[7] Again, actual innocence of the crime is irrelevant here. In his Reply to Respondent's Supplemental Suggestions in Opposition to Petition for Writ of Habeas Corpus, Mr. Simmons does in fact claim actual innocence of the death penalty in support of the manifest injustice exception. Respondent goes on to claim that actual innocence of the death penalty requires "that there are not statutory aggravating circumstances that make him eligible for the death penalty."[8] This is an incorrect statement of the law.

In ***Sawyer v. Whitley***, 505 U.S. 333, 345 (1992), the Court held that "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of

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[6] *See* Return, p. 4.

[7] *See* Return, pp. 9-10.

[8] *See* Return, p. 9.

eligibility had not been met." (emphasis added). The Eighth Circuit adopted this standard in ***Lingar v. Bowersox***, 176 F.3d 453, 462 (8th Cir. 1999), holding that to show actual innocence of the death penalty the petitioner "must show that no aggravating circumstance existed, or that some other condition of eligibility for the death penalty was not met." It is under this standard that the Court must analyze Mr. Simmons' claim that the manifest injustice exception is satisfied.

Petitioner is not required to prove both "cause and prejudice" and "manifest injustice" to obtain habeas review. However, because Mr. Simmons can prove both of these exceptions, he will address each of them as a basis for this Court excusing the procedural default.

A. Cause and Prejudice

A petitioner can establish "cause" for failure to raise a claim "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." ***Reed v. Ross***, 468 U.S. 1, 16 (1984). Likewise, in ***Coleman v. Thompson***, 501 U.S. 722, 753 (1991) the Court held that "showing that the . . . legal basis for a claim was not reasonably available to counsel would constitute cause." This standard is satisfied where the Supreme Court precedent petitioner relies on "explicitly overruled" a prior Supreme Court decision. ***Reed***, at 17. Under these circumstances, "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the

position that [the Supreme Court] has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement." ***Id***.

Such is the case here. On June 20, 2002, the United States Supreme Court rendered its decision in ***Atkins v. Virginia***, 122 S.Ct. 2242 (2002). The Court held that contemporary standards of decency bar the use of the death penalty for mentally retarded offenders. Significantly, the Court found as *relevant* to this decision, although not "dispositive," the overwhelming disapproval in the world community of the death penalty for persons with mental retardation. ***Atkins***, 122 S.Ct. at 2249 n.21. This finding is highly significant to Mr. Simmons' claim based upon his juvenile status at the time of the crime, because it implicitly overrules the controlling precedent of ***Stanford v. Kentucky***, 492 U.S. 361 (1989), wherein a majority of the Court completely rejected the sentencing practices of other countries as *relevant* to American concepts of decency. ***Stanford***, 492 U.S. at 369 n.1; 382 (O'Connor, J., concurring in part and concurring in judgment). Although world opinion may not have been dispositive for the Court's decision in ***Atkins***, a much stronger case exists that it should be not only *relevant* but *dispositive* as to the juvenile death penalty issue.

In addition to a reversal in how the Court considered world opinion in determining evolving standards of decency, the ***Atkins*** dissenters rightfully noted a

sweeping change from the limited focus on a few indicators of the standards of decency to a broader consideration. Justice Rehnquist noted:

> I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. . . . The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents. . . .

Atkins, 122 S.Ct. at 2252-53 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., dissenting).

There are two reasons that support "cause" for counsel's failure to raise this claim in earlier appeals to this Court. First, the legal basis for the claim was unavailable until ***Atkins*** was decided (long after Mr. Simmons exhausted his state and federal appeals). Prior to ***Atkins***, the argument would have been nothing more than a legally unsupported "boilerplate" assertion of the kind that is routinely summarily rejected by this Court. Second, the basis for making the analogy between the culpability of the mentally retarded and that of juveniles is a recent and emerging development. It is only in the last couple of years that reliable and comprehensive research has proven that there is a biological and physical reason, beyond the child's control, that makes juvenile offenders (like mentally retarded

offenders) less culpable than adult offenders.[9] Because the legal basis for making the claim that the execution of juveniles violates the state and federal Constitutions was not reasonably available to counsel during Mr. Simmons' previous appeals to this Court, "cause" for failure to raise the claim is established.

Next, Mr. Simmons must show "prejudice," or "that the error he asserts worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." ***Covey***, at 210-11. This fact is obvious. That Christopher Simmons was sentenced to death as a juvenile, where both the state and federal Constitutions prohibit such punishment as cruel and unusual, certainly worked to his "actual and substantial disadvantage." Such error clearly infected the entire trial as Mr. Simmons should not even have been eligible for the death penalty. Having established the required "cause and prejudice" for failing to raise this claim in his earlier appeals, this Court must now reach the merits of the claim. ***See Covey***, at 210.

B. Manifest Injustice

Likewise, Mr. Simmons can show that "manifest injustice" would result if habeas relief is not granted based on the fact that he is "innocent of the death penalty." Such showing is made if there is some "condition of eligibility" for the death penalty that has not been met. ***Sawyer***, 505 U.S. at 345-47. Because the

[9] ***See*** Section III.B. of this pleading, *infra*, pp. 36-62.

Constitution requires as a "condition of eligibility" for the death penalty that one be at least 18 years old, and because Chris Simmons was only 17 years old at the time of the crime, he is "innocent of the death penalty."

Furthermore, it is clearly "more likely than not that no reasonable juror would have convicted" Mr. Simmons because the jury could not have found the initial "condition of eligibility" for the death penalty -- that Mr. Simmons was at least 18 years old at the time of the crime. ***See Schlup v. Delo***, 513 U.S. at 327. Because under the law "manifest injustice" would result if habeas relief is not granted in this case, this Court must consider the merits of Mr. Simmons' claim.

II. The Supreme Court's Refusal to Grant Certiorari or to Exercise its Original Habeas Jurisdiction on this Issue in Other Cases is Wholly Irrelevant

Again and again in the pleadings filed with this Court respondent has urged that the United States Supreme Court's refusal to grant certiorari on the juvenile issue in other cases is dispositive evidence that the Court intends that its reasoning in ***Atkins v. Virginia*** does not apply to preclude the juvenile death penalty. In its Return, respondent acknowledges that the Supreme Court's actions are "without precedential value," and then states that "surely the Supreme Court would have" acted in those cases if it thought ***Atkins*** applied.[10] In other words, according to

[10] *See* Return, pp. 15-16.

respondent, the Supreme Court's actions are admittedly without precedential value, yet should be given such value by this Court. Such position not only defies logic, it ignores the express and unequivocal language often repeated by the Supreme Court itself.

Repeatedly, the Court has stated that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." ***United States v. Carver***, 260 U.S. 482, 490 (1923). The Court reiterated this principle more forcefully in ***State of Md. v. Baltimore Radio Show***, 338 U.S. 912, 919 (1950), stating that "this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated."

The Court went on to detail its reasoning behind this admonition:

> A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law,

> not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Id. at 917-18.

The Court is unwavering in its adherence to this view when its members author opinions or dissents from the denial of certiorari, consistently citing back to the ***Baltimore Radio Show*** opinion. For example, in ***Schiro v. Indiana***, 493 U.S. 910 (1989), Justice Stevens reminded that:

> There is a critical difference between a judgment of affirmance and an order denying a petition for a writ of certiorari. The former determines the rights of the parties; the latter expresses no opinion on the merits of the case.

Id. at 910. Again, in ***Excel Communications, Inc. v. AT&T Corp.***, 528 U.S. 946 (1999), Justice Stevens noted:

> The importance of the question presented in this certiorari petition makes it appropriate to reiterate the fact that the denial of the petition does not constitute a ruling on the merits.

Id. *See also* ***Singleton v. Commissioner of Internal Revenue***, 439 U.S. 940, 942-44 (1978) (Stevens, J., opinion respecting the denial of certiorari).

Specifically relevant to the denial of certiorari in the cases referred to in respondent's Return are Justice Stevens comments in ***Bethley v. Louisiana***, 520 U.S. 1259 (1997):

> It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. . . . That is certainly true of our decision to deny certiorari in this case. It is worth noting the existence of an arguable jurisdictional bar to our review.

Id. (citations omitted).

While the above quotes are certainly "enough said," and make clear that no explanation for denial of certiorari is needed, it is worth pointing out that there are objective factors in each of the cases that provide a probable reason for the Court's refusal to hear the cases.

A. <u>Denial of Certiorari and Original Habeas Review in the Napoleon Beazley Case</u>

A brief look at the circumstances under which the Beazley case was presented to the Court reveal some likely non-merits based reasons for denying certiorari in the case. First, only six Justices participated in the decision making in Mr. Beazley's case. Out of concern for the possible appearance of a conflict of interest, Justices Scalia, Souter, and Thomas took no part in the consideration or disposition of the certiorari petition or the habeas petition. ***See Beazley v. Texas***, 122 S.Ct. 2287 (2002) (Mem.), ***In re Napoleon Beazley***, 122 S.Ct. 2322 (2002) (Mem.). Extensive research has revealed no case in which the Court has granted certiorari with only six Justices participating. Indeed, such action would likely be futile as there is little chance that a binding majority opinion would result from consideration of the issue by only six Justices of the Court. Furthermore, as to the original habeas petition, the Court is consistently reluctant to invoke its original jurisdiction. Also, considering the fact that Justice Scalia authored the opinion in ***Stanford***, it is unlikely that the Court would now proceed without him to potentially alter or overrule his landmark decision.

In addition, the procedural posture in which Mr. Beazley's case came before the Court must be considered. In Texas, death row inmates file a state habeas corpus petition as part of their routine appeals. A successor state habeas is then allowed only if very strict requirements are met. ***See*** Section 5, Article 11.071, Texas Code of Criminal Procedure. Mr. Beazley attempted to raise the Eighth

Amendment issue in a successor state habeas. The Texas court did not deny the successor habeas on its merits, but rather ruled that Mr. Beazley did not meet the requirements to file a successor habeas petition and denied the petition solely on procedural grounds. The Supreme Court was then faced with a decision as to whether certiorari would be granted on a claim that was purportedly denied on solely independent and adequate state procedural grounds, rather than reviewing a Texas court ruling that the Eighth Amendment is not violated by a juvenile execution.

Under these circumstances, the question of the Supreme Court's jurisdiction to make a merits ruling may have presented a sufficient hurdle to prompt the Court to deny certiorari on that basis alone. Certainly, the fact of the short-handed Court and the potential procedural problems in Mr. Beazley's case obviate any inference that the Court had some preconceived idea that, whatever the opinion in ***Atkins*** would say, it would not have any applicability to the juvenile issue. In fact, any such inference is forbidden by the Court itself, which has stated that denial of certiorari "does not remotely imply approval or disapproval of what was said by the [state court]," and "carries no support whatever for concluding" that the state court correctly or incorrectly interpreted Supreme Court precedent. ***Baltimore Radio Show***, at 919.

B. Denial of Certiorari in Toronto Patterson's Case

As with Mr. Beazley's case, Mr. Patterson's case[11] suffered from arguable procedural bars to review. As a Texas death row inmate, Mr. Patterson filed a state habeas corpus petition as part of his routine appeals. That petition was denied. Therefore, Mr. Patterson was allowed to file a successor state habeas only if very strict requirements are met. *See* Section 5, Article 11.071, Texas Code of Criminal Procedure. It was in a successor habeas that Mr. Patterson raised the issue of the constitutionality of executing juveniles. However, the Texas court did not consider the issue on the merits, instead dismissing the petition solely on procedural grounds for failure to meet the requirements to file a successor habeas petition. The Supreme Court was again faced with considering whether to grant certiorari to decide the merits of a claim the Texas court had purportedly denied on independent state procedural grounds, not to review the merits of a claim rejected by the state court after a merits review. Naturally, the jurisdictional issue may have presented a sufficient hurdle to the Court's grant of certiorari in Mr. Patterson's case.

In fact, some members of the Supreme Court have expressed the belief that under the procedural scenario of Mr. Patterson's case, Supreme Court review is strictly prohibited. In ***Moore v. Texas***, 122 S.Ct. 2350 (2002) (Mem), the Court granted a stay of execution to two death row inmates pending the decision in ***Atkins***. Justice Scalia, joined by Justices Rehnquist and Thomas, dissented from

[11] *See* ***Patterson v. Texas***, 528 U.S. 826 (1999) (Mem.).

the stay, arguing that petitioners sought review from state habeas petitions that had been dismissed on adequate and independent state grounds. ***Id***. at 2351. Like Mr. Patterson, petitioners in ***Moore*** had filed successor state habeas petitions that had been dismissed by the Texas court as an abuse of the writ. ***Id***. at 2351-52. In support of his dissent, Scalia quoted the "firm rule" of ***Coleman v. Thompson***, 501 U.S. 722, 729 (1991):

> this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.

Moore, at 2352. Clearly, although the reason for denial of certiorari is irrelevant in Mr. Patterson's case, at least three of the Justices believed that procedural barriers prohibited such review under any circumstances.

C. Denial of Original Habeas Review in Kevin Stanford

Under the same reasoning, the Supreme Court's denial of the original habeas corpus petition in Kevin Stanford's case provides this Court with no direction on the issue presented in Mr. Simmons' pleadings. First, as with the denial of certiorari, "[r]efusal of the writ, without more is not an adjudication on the merits and is to be taken as without prejudice to an application to any other court for the

relief sought." ***Ex parte Abernathy***, 320 U.S. 219, 220 (1943). *See also* ***In re Tracy***, 249 U.S. 551, 551-52 (1919).

The Supreme Court rarely hears applications for habeas corpus relief. ***Rosenberg v. Denno***, 346 U.S. 271 (1953). The Court has explained its habeas corpus jurisdiction as follows:

> . . . jurisdiction is discretionary . . . and this Court does not, save in exceptional circumstances, exercise it in cases where an adequate remedy may be had in a lower federal court . . . or, if the relief sought is from the judgment of a state court, where the petitioner has not exhausted his remedies in the state courts . . .

Ex parte Abernathy, 320 U.S. at 220 (citations omitted). This jurisdiction has been codified in Supreme Court Rule 20.4(a):

> A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§2241 and 2242, and in particular with the provision in the last paragraph of §2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C.

> §2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

See also ***Felker v. Turpin***, 518 U.S. 651, 665 (1996) (quoting Rule 20.4(a) as providing relevant standards of granting original writ)

Another "rule" of the Supreme Court's habeas jurisdiction, referred to in Rule 20.4(a) as the requirement of exhaustion of "available remedies," provides that "the jurisdiction of other competent courts to afford relief may not be passed by and the original jurisdiction of this court be invoked, in the absence of exceptional conditions justifying such course." ***In re Tracy***, 249 U.S. at 551. This concept continues to be invoked by the "modern day" Court:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and

already cognizant of the litigation, have had an opportunity to pass upon the matter."

Coleman v. Thompson, 501 U.S. at 731 (citations omitted).

A review of Supreme Court caselaw shows that this doctrine of "comity" -- which requires exhaustion of other available remedies -- has provided the Court with what it perceives as compelling argument against interference in a state case through the use of the habeas corpus writ. In ***Felker v. Turpin***, 518 U.S. at 662, the Court recognized that its authority to grant habeas relief to state prisoners is limited by 28 U.S.C. §2254. In addition, the Court claimed that its consideration of original habeas petitions is "bound by," or at least "informed by" the limitations on successor petitions found in 28 U.S.C. §§2244(b)(1) and (2).[12] ***Id***. at 662-63. The Court has previously recognized the relationship between "comity" and the "exhaustion" requirement. In ***Parisi v. Davidson***, 405 U.S. 34, 50 (1972), the Court noted that "[t]he principle of comity was invoked by Congress when it wrote in 28 U.S.C. §2254 that federal habeas corpus shall not be granted a person in state

[12] It is worth noting that while limitations on successor petitions in 28 U.S.C. §2244 allow a successor alleging a constitutional infirmity rendering the defendant actually innocent of the *crime*, they don't specifically allow a successor where the allegation is actual innocence of the *death penalty*. *See* 28 U.S.C. §2244(b)(2)(B)(ii).

custody 'unless it appears that the applicant has exhausted the remedies available in the courts of the State.'"

Recently, in ***Carey v. Saffold***, 122 S.Ct. 2134 (2002), the Court again reminded:

> The exhaustion requirement serves AEDPA's [Antiterrorism and Effective Death Penalty Act's] goal of promoting "comity, finality, and federalism," ***Williams v. Taylor***, 529 U.S. 362, 364, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), by giving state courts "the first opportunity to review [the] claim," and to "correct" any "constitutional violation in the first instance."

Id. at 2138 (citation omitted).

Two factors in Mr. Stanford's case violate the conditions required for the Court to entertain an original habeas corpus petition. First, the claim was not "fairly presented" to the state courts as required by comity and exhaustion. *See* ***Picard v. Connor***, 404 U.S. 270, 275 (1971). Second, the claim was never presented to the federal district court, violating the requirement that before Supreme Court intervention can occur it must be established that adequate relief cannot be obtained from any other court.

On the surface, it would appear that Mr. Stanford's claim <u>was</u> presented to the state courts. Indeed, Mr. Stanford did allege the unconstitutionality of the

execution of juveniles in his initial direct appeal. That claim led to the Supreme Court's 1989 decision in ***Stanford v. Kentucky***, 492 U.S. 361 (1989), which rejected the claim. Although today the claim is still titled "constitutionality of the execution of juveniles," its factual and legal basis in no way resemble the claim as it was made at the time of the Supreme Court's decision. As detailed in Section III of this brief,[13] the states are consistently evolving away from condoning and carrying out juvenile executions, a worldwide consensus has developed against such executions, and new research reveals significant facts about the biological development of children that strongly mitigates against juvenile executions. In other words, because of the developments over the past 10 years, the claim is an entirely different claim than the one presented to the state court.

Therefore, it could not be said that the claim presented in the original habeas petition to the Supreme Court was ever fully considered by the state court. Because of procedural restrictions, the state court cannot now consider the merits of Mr. Stanford's claim as it was presented to the Supreme Court. Raising a claim in the state court that for procedural reasons cannot receive merit consideration by that court does not constitute "fair presentation" for exhaustion purposes when the

[13] *Infra*, at pp. 30-90.

Supreme Court's original jurisdiction is being invoked. ***Castille v. Peoples***, 489 U.S. 346, 351 (1989).[14]

Even more troubling to the exercise of Supreme Court jurisdiction than the lack of exhaustion of the issue in state court is the fact that Mr. Stanford never presented the claim (in any form) to the federal district court. Despite the fact that Mr. Stanford filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the federal district court, he did not challenge the constitutionality of executing juveniles. Therefore, the original habeas petition in the Supreme Court was a losing battle from the beginning because it violated Supreme Court rules and caselaw, as well as statutory provisions, prohibiting petitioner from bypassing lower courts that could provide relief.

As with the denial of a petition for writ of certiorari, the denial of original habeas review does not speak to the merits of the issue. As the above analysis shows, under the procedural posture of Mr. Stanford's case the Court would have

[14] As the ***Castille*** Court pointed out, exhaustion may exist because Mr. Stanford's claims are procedurally barred under Kentucky law. Despite this technicality, the Supreme Court's consistently strong assertion of the comity doctrine would still undoubtedly give the Court pause when deciding whether to exercise its original and discretionary jurisdiction on a matter the state court will never have an opportunity to consider.

been required to stretch the rules to grant habeas review. Not surprisingly, most Justices were unwilling to take such a position. Such action has no bearing on the issues before this Court as it in no way reveals the Supreme Court's position on the substantive issues.

III. THE SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT IN *ATKINS V. VIRGINIA*, WHEN APPLIED TO THE ISSUE OF JUVENILES, COMPELS THE CONCLUSION THAT JUVENILE EXECUTIONS LIKEWISE OFFEND THE CONSTITUTION

A. THE SUPREME COURT'S DECISION IN *ATKINS* IS RELEVANT TO THIS COURT'S CONSIDERATION OF THE JUVENILE DEATH PENALTY ISSUE

In ***Stanford v. Kentucky***, 492 U.S. 361, 380 (1989), the Supreme Court held that the Constitution was not violated by the execution of a 16 or 17-year-old defendant. On that same day, the Court held in ***Penry v. Lynaugh***, 492 U.S. 302 (1989), that the Eighth Amendment did not preclude the execution of the mentally retarded.

In ***Atkins v. Virginia***, 122 S.Ct. 2242, 2244, (2002)[15], the Supreme Court reconsidered the question of whether the executions of mentally retarded persons

[15] Published at **Appendix Exhibit A**, pp. A1-A27.

"are 'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal Constitution." In answering "yes," the Court relied generally on two lines of reasoning. First, the Court recognized the fact that the mentally retarded "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." ***Id***. Second, the Court considered the current prevailing standards of decency as reflected by objective standards such as legislatures, experts, and the public. ***Id***., at 2244, 2247.

When these same two considerations -- diminished culpability and objective standards of decency -- are considered in the context of the juvenile death penalty, it becomes clear that the execution of juveniles suffers from the same problems that led the Court to forbid the execution of the mentally retarded. Article 1, Section 21 of the Missouri Constitution forbids the infliction of cruel and unusual punishment. Relying on the reasoning in ***Atkins*** as it is applicable to the juvenile death penalty, this Court should invoke that provision of the Constitution, as well as the Eighth Amendment to the United States Constitution, to end the execution of juveniles in Missouri. To act otherwise would be to ignore Supreme Court precedent, which reserves the death penalty for only the most culpable offenders and prohibits such penalty when evolving standards of decency render its infliction cruel and unusual punishment.

In its Return, respondent takes the position that the Court's decision in ***Atkins*** has no application to the issue of the constitutionality of the juvenile death penalty. According to respondent, because there is no case expressly overruling ***Stanford***, reliance on ***Atkins*** would be contrary to United States Supreme Court precedent.[16] However, as shown in Section I, *supra*, ***Atkins*** did in fact overrule ***Stanford*** to the extent that ***Stanford*** refused to consider international norms, views of professional and religious organizations, and opinion polls in its determination of the "evolving standards of decency."

Respondent fails to attack any of Mr. Simmons' arguments showing why, because of the similar levels of culpability and similar "standards of decency," ***Atkins*** should be applied to petitioner's case. Instead, respondent makes the blanket statement that ***Atkins*** is limited only to the issue of mentally retarded offenders, and that footnote 18 of the ***Atkins*** decision shows that the Court was not also deciding the constitutionality of executing a juvenile offender.[17] Respondent's position asks this Court to wear blinders in considering the issue. Obviously, ***Atkins*** did not specifically address the constitutionality of executing juvenile offenders and cannot be read to establish a rule that such executions are

[16] *See* Return, p. 12.

[17] *See* Return, pp. 12-16.

unconstitutional. Just as obviously, the Supreme Court will not ignore its previous decisions interpreting the Eighth Amendment when determining whether the Eighth Amendment prohibits the execution of juvenile offenders.

An example of this fact is seen in the Supreme Court's recent line of cases on the issue of enhanced sentencing procedures and the Sixth Amendment. Initially, in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the Court considered whether the defendant's Sixth Amendment rights were violated in a firearms case where the court, post-trial, found a hate crimes enhancement and sentenced the defendant beyond the statutory maximum for the crime the jury found him guilty of. The Court found that this action violated the defendant's right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ***Id***. at 477. Next, in ***Ring v. Arizona***, 122 S.Ct. 2428, 2443 (2002), the Court held that the Sixth Amendment prohibits the sentencing judge, sitting without a jury, from finding the aggravating circumstances necessary for imposition of the death penalty. The Court found that this new rule in ***Ring*** was compelled by the ***Apprendi*** decision and required because the old law was inconsistent with ***Apprendi***. ***Id***. Most recently, the Court granted certiorari, vacated, and remanded in ***Allen v. United States***, 122 S.Ct. 2653 (2002) (Mem.), for consideration in light of ***Ring***. In ***Allen***, the issue is whether the aggravating circumstances must be pled in the indictment to satisfy the rule in

Apprendi and ***Ring***. Clearly, the issues in ***Apprendi***, ***Ring***, and ***Allen*** are not identical, just as the issues in ***Atkins*** are not identical to those in Mr. Simmons' case. But, as the Court recognized in the ***Apprendi*** line of cases, it is essential to maintain a consistent interpretation of the constitutional principles, even under varying factual scenarios.

It follows that this Court will naturally look to Supreme Court precedent on interpreting the Eighth Amendment, namely ***Atkins***, in deciding whether the state constitution and the Eighth Amendment prohibit the execution of juveniles. As illustrated, respondent's position that ***Atkins*** can not be applied by lower courts to Eighth Amendment issues that are not factually identical to ***Atkins*** runs contrary to what is routinely done by state and federal courts considering a myriad of constitutional questions. Because the bases for declaring executions of mentally retarded offenders unconstitutional in ***Atkins*** apply with equal if not stronger force to prohibit the executions of juvenile offenders, this Court should prohibit Christopher Simmons' execution as violating the state and federal constitutional prohibitions against cruel and unusual punishment.

Footnote 18 of the ***Atkins*** opinion does not compel a different result. The footnote, while making a valid point on the national consensus against executing the mentally retarded, does not tell all of the facts on the juvenile issue. As the footnote says, only two states have abolished the juvenile death penalty by statute

since ***Stanford***, compared to several state statutes that have banned the execution of the mentally retarded since ***Penry***. ***Atkins***, 122 S.Ct. at 2249 n. 18. What the footnote does not tell is that at the time of ***Atkins***, 30 states banned the execution of the mentally retarded, compared to 28 states that ban the execution of juveniles.[18] Furthermore, the footnote does not speak to all of the additional evidence identified in ***Atkins*** as relative to the development of a "national consensus," such as opinions of professional organizations and religious groups, public polling, and world opinion. ***Id***. at 2249, n. 21. These factors identified in ***Atkins*** all apply to show a "national consensus" against the execution of juveniles. It seems that since ***Penry***, state laws against executing the mentally retarded have merely been "catching up" with the national consensus against executing juveniles, which is clearly more longstanding and continues to gather in strength.[19] This fact supports

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[18] This fact puts to rest respondent's assertion that legislation "demonstrates no such consensus for abolishing the death penalty for juvenile offenders." *See* Return, p. 15.

[19] In ***Atkins***, the Court held that "[i]t is not so much the number of these States [banning the execution of the mentally retarded] that is significant, but the consistency of the direction of change." ***Atkins***, at 2249. In Section III.C.1. of this brief, pp. 62-70, petitioner shows the growing "consistency of the direction of change" against executing juvenile offenders.

Mr. Simmons' argument that because the national consensus against the juvenile death penalty is at least as strong as the national consensus against executing the mentally retarded, ***Atkins*** applies to require a prohibition against executing juveniles.

B. JUVENILES DO NOT ACT WITH THE SAME DEGREE OF MORAL CULPABILITY AS ADULTS

The first basis for the holding in ***Atkins*** was that the mentally retarded do not possess the same level of moral culpability as adults. The Court described the mental status of the mentally retarded as follows:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 2250-51. Juveniles, because of their age, also suffer from significant "diminished capacities" in that they are less able to control their impulses and make reasoned judgments. Respondent characterizes this fact as being merely something that "petitioner may believe," which "does not establish that [juveniles and the mentally retarded] are one in the same."[20]

It is respondent's position that the mentally retarded and juveniles are distinguishable groups because youthfulness, unlike mental retardation, is not a mental disease.[21] This misses the logic behind the comparison. The point is not that juveniles have a mental disease, but that like the mentally retarded, they are by definition less culpable than the class of murders for which the Eighth Amendment allows the death penalty. In ***Atkins***, the Court held that the "deficiencies" found in the mentally retarded "diminish their personal culpability." ***Atkins***, at 2251. Because similar "deficiencies" are found in juveniles, their "personal culpability" is likewise diminished, thus justifying the application of ***Atkins*** to Mr. Simmons' case.

Obviously, what petitioner "may believe" as to the culpability levels of juveniles is irrelevant to this Court's decision making. However, far from being petitioner's "belief," the fact that juveniles lack the mental capacity to act with the

[20] *See* Return, pp. 12-13.

[21] *See* Return, p. 13 n. 2.

same level of moral culpability as adults is supported by a good deal of recent research showing strong scientific support for the proposition.

1. Physical and Emotional Makeup of the Adolescent

Even at the time of the Court's decision in ***Stanford***, "[p]sychiatrists, psychologists and other child development experts recognize[d] that adolescence is a transitional period between childhood and adulthood in which young people are still developing the cognitive ability, judgment and fully formed identity or character of adults."[22] To understand how the juvenile mental state mirrors that of the mentally retarded, four different areas of research must be looked at: lack of brain development, rapid physical changes during adolescence, cognitive and emotional deficits of adolescents, and the destructive and short-sighted nature of adolescent behavior. A look at the research in these areas, especially in the last

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[22] ***Thompson v. Oklahoma***, 487 U.S. 815 (1988). *Brief of the American Society for Adolescent Psychiatry and The American Orthopsychiatric Association as Amici Curiae in support of petitioner*, p. 267. (Filed May 15, 1987).

five years, shows that "scientists have discovered that adolescent brains are far less developed than previously believed."[23]

a. Lack of Brain Development as a Basis for Poor Impulse Control and Decision-Making of Adolescents

Along with everything else in the body, the adolescent brain is experiencing significant development. "Brain researchers have wondered why the onset of puberty presages such turbulence, both for healthy kids and those affected by . . . psychiatric disorders."[24] The recent research suggests that the adolescent brain is "far less finished, and far more dynamic, than previously believed."[25] The nature of what's "missing" in a juvenile's brain helps explain the erratic behaviors and thought processes that are universal among adolescents and that will be detailed in later sections of this brief.

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[23] American Bar Association. "Cruel and Unusual Punishment: The Juvenile Death Penalty." *Adolescent Brain Development and Legal Culpability*. Winter 2003. **Appendix Exhibit B**, pp. A28-A31.

[24] Landau, Misia. "Deciphering the adolescent brain." *Focus: News from Harvard Medical, Dental & Public Health Schools*. April 21, 2000. **Appendix Exhibit C**, pp. A32-A37.

[25] *Ibid*.

A neuroscientist at McMaster University in Ontario wrote, "The teenage brain is a work in progress. . . . and it's a work that develops in fits and starts."[26] "One of the last parts to mature is in charge of making sound judgments and calming unruly emotions."[27] And, the "prefrontal cortex, where judgments are formed, is practically asleep at the wheel. At the same time . . . the limbic system, where raw emotions such as anger are generated, is entering a stage of development in which it goes into hyperdrive."[28]

The prefrontal cortex is the supervisor of the brain; it "separates man from beast," enabling us to regulate our thoughts and to decide whether to cultivate or dismiss them.[29] It also plans, strategizes, and envisions consequences.[30] The preadolescent and adolescent neurological growth periods are bilateral, involving

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[26] Brownlee, Shannon. "Inside the teen brain: Behavior can be baffling when young minds are taking shape." *Lewis-Clark State College.* Undated.

[27] *Ibid*.

[28] *Ibid*.

[29] Giedd, Jay. Interview with Public Broadcasting Services. **Appendix Exhibit D**, pp. A38-A44.

[30] Nelson, Charles. Interview with Public Broadcasting Services. **Appendix Exhibit E,** pp. A45-A51**.**

primarily frontal lobe connections.[31] Interestingly, frontal lobe abnormalities are associated with murder in adults.[32] As David Amen has pointed out, when we get a violent thought in our heads, we recognize the thought as horrible and we are then able to dismiss it. Unfortunately, the part of our brain that allows us to think about our thought, to classify it as horrible and then take charge of its dismissal, is the very part of the brain, the prefrontal cortex, that undergoes more change during adolescence than any other part of the brain.[33] As a result, adolescents do not have the capacity to use the prefrontal cortex nearly as much as the amygdala, the more emotional and aggressive part of the brain.[34] Even the most sophisticated-

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[31] Lewis, *Child and Adolescent Psychiatry: A Comprehensive Textbook*, p. 41.

[32] *Ibid*., p. 337. *See also* Nelson, Charles. Interview with Public Broadcasting Services. **Appendix Exhibit E**, pp. A45-A51.

[33] Giedd, Jay. Interview with Public Broadcasting Services. **Appendix Exhibit D**, pp. A38-A44. Overproduction of gray matter similar to that in infancy as well as pruning of excess synaptic connections characterize the changes in the prefrontal cortex during adolescence.

[34] Yurgelun-Todd, Deborah. Interview with Public Broadcasting Services. **Appendix Exhibit F**, pp. A52-A58.

appearing teenagers rely heavily on this emotional part of the brain, as MRI[35] scans have shown. Also, males use the amygdala much more than females, as the male prefrontal cortex develops more slowly than the female prefrontal cortex.[36] Quite simply, adolescents do not have the same ability as the rest of us to evaluate their thoughts, to judge them as right or wrong, and to stop them from determining their behavior. As a result, they are more impulsive.

b. Rapid Physical Changes During Adolescence

"Because of the profound character of the changes across the early adolescent period, this time of life -- more so than other developmental transitions

[35] Functional magnetic resonance imaging. "The scientists looked at the brains of 18 children between the ages of 10 and 18 and compared them to 16 adults using functional magnetic resonance imaging (fMRI). Both groups were shown pictures of adult faces and asked to identify the emotion on the faces. Using fMRI, the researchers could trace what part of the brain responded as subjects were asked to identify the expression depicted in the picture."

[36] Spinks, Sarah. "Adolescent Brains are a Work in Progress." **Appendix Exhibit G**, pp. A59-A63.

-- represents a period of potential risk."[37] During adolescence, almost every part of the body is undergoing change; the physical composition of the brain, and even the skull bones thicken, lengthening and widening the head.[38]

In addition to the profound physical changes, adolescents also undergo dramatic hormonal changes. The pituitary gland releases hormones that trigger a great increase in the manufacture of two gonadotropic hormones.[39] The release of these hormones is so powerful that it can alter physical behavior, including causing changes in the sleep cycles of adolescents, who tend to feel tired during the morning and awake at night regardless of how much sleep they get.[40]

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[37] Graber, Julia A., Jeanne Brooks-Gunn, and Anne C. Peterson, eds. *Transitions through Adolescence: Interpersonal Domains and Context*. Mahwah, NJ: Lawrence Erlbaum, 1996, p. 18.

[38] Cole, Michael, and Sheila R. Cole. *The Development of Children*. 4th ed. Worth Publishers: New York, NY. 2001, p. 609.

[39] *Ibid*., p. 608.

[40] Carskadon, Mary, "When Worlds Collide: Adolescent Need for Sleep Versus Societal Demands," in *Adolescent Sleep Needs and School Starting Times*, editor Kyla Wahlstrom, Phi Delta Kappa Educational Foundation, 1999. Also see Dement, William C. *The Promise of Sleep*. Dell Paperback 1999, p. 85.

One of the hormones having the most dramatic effect on the body is testosterone. This hormone is associated with aggression. "During puberty . . . boys' levels [of testosterone] increase by 10 to 20 times."[41] In fact, "[s]everal laboratories have looked at hormones and their associations with adolescent aggression and problem behavior. Normal adolescent boys and delinquent boys showed a positive association between testosterone levels and aggression scores."[42]

c. Cognitive and Emotional Deficiencies of Adolescents

"[An adolescent is] not yet an independent, mature, resolute, strong, young adult. The adolescent is really both part child and part adult."[43] Normal adolescent narcissism occurs as part of the maturation process. "Adolescents tend to think that other people are as interested in what they are thinking and doing as they are themselves."[44] This self-focused perception is what leads to self-consciousness,

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[41] Adams, Gerald R., Raymond Montemayor, and Thomas P. Gullota, eds. *Psychosocial Development during Adolescence.* Thousand Oaks, CA: Sage Publications, 1996, p. 286. Also see Cole et al., *The Development of Children,* p. 609.

[42] Adams et al., *Psychological Development during Adolescence*, p. 284.

[43] Lewis, *Child and Adolescent Psychiatry: a Comprehensive Textbook*, p. 287.

[44] Cobb, Nancy J. *Adolescence: Continuity, Change, and Diversity*. Mountain View, CA: Mayfield Publishing, 1998, p. 125.

feelings of uniqueness ["you don't understand what my life is like"] and the need for privacy so common to adolescents.[45] It also leads to the self-destructive "personal fable," in which adolescents think what happens to others will not happen to them and therefore engage in sensation-seeking and risky behaviors.[46] As a result of such egocentrism, almost no adolescents have reached a stage of moral reasoning in which they can truly see themselves as members of a community, subjecting their own desires to its laws so that the community may function.[47] A teenager's "need to be independent" is often in part a selfish desire to escape feeling like part of a family, the very feeling the teenager's parents are seeking from him.[48]

Most adolescents are just entering a form of thought in which they can consider events that may only exist as possibilities for them."[49] In one study, 40 percent of high school males and 18 percent of high school females said it was

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[45] *Ibid*., p. 172.

[46] *Ibid*.

[47] *Ibid*., p. 147.

[48] Kegan, Robert. *In Over Our Heads.* Cambridge, MA: Harvard University Press, 1994, pp. 15-36.

[49] Cobb. *Adolescence: Continuity, Change, and Diversity*, p. 124. See also Kegan, *In Over Our Heads*, pp. 15-36.

okay for a male to force sex upon a female who was drunk.[50] Furthermore, multiple studies have found that 20 to 30 percent of high school students report seriously considering committing suicide.[51] Indeed, adolescence is a time when little thought is given to the teenager's sense of "moral responsibility" to the community due to the inability to see past one's own world and personal preoccupations.

d. The Destructive and Short Sighted Nature of Adolescent Behavior

The physical and emotional turmoil that characterizes adolescent development can have disturbing results. "From a clinical perspective, there is widening recognition that severe psychological difficulties and psychiatric syndromes often appear in adolescence, which place young people at risk for drug use, criminality, and suicide, as well as for psychiatric disorders and

[50] Schwartzberg, Allan Z., ed. *The Adolescent in Turmoil*. A monograph of the International Society for Adolescent Psychiatry. Westport, CN: Praeger, 1998, p. 6.

[51] See, e.g. Schwartzberg, *The Adolescent in Turmoil*, p. 8, and Cole, et al., *The Development of Children*, p. 624.

impaired personal relationships throughout their lives."[52]

Many adolescents engage in self-destructive behaviors without even realizing the risk they are taking. These behaviors take different forms for different youths. Statistics reflect the immaturity with which these young people act. "One in four sexually active U.S. adolescents contract a sexually transmitted disease; this level is twice that of people in their twenties."[53] In 1993, researchers found that adolescents more often utilize avoidant coping strategies [e.g. listening to music, playing sports, sleeping, drinking alcohol] than approach-oriented coping strategies [e.g. trying to directly solve the problem, seeking help and guidance from someone about the problem] to deal with negative affective experiences.[54] Escapism, in various forms, is popular. "Suicide for adolescents between 15 and 19 years old is the third leading cause of death, closely behind motor vehicle accidents and homicide"[55], and the "best annual estimate of adolescent runaways is

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[52] Reiss, David, with Jenae M. Neiderhiser, E. Mavis Hetherington, and Robert Plomin. *The Relationship Code: Deciphering Genetic and Social Influences on Adolescent Development.* Cambridge, MA: Harvard University Press, 2000.

[53] Cole et al., *The Development of Children*, p. 624.

[54] Lewis, *Child and Adolescent Psychiatry . . .*, p. 287.

[55] Straus, Martha B. *Violence in the Lives of Adolescents.* New York, NY: Norton, 1994, p. 31.

between 1.3 and 1.4 million."[56] Lastly, "[d]riving under the influence of alcohol is reported by 17 percent of high school students."[57]

Violence among youth is a common form of self-destructive behavior, as adolescents have not yet developed a full appreciation of risks and are unable to understand consequences. In fact, aggressive behavior is such a staple of adolescence that "[o]ne third to one-half of all referrals to child and adolescent outpatient clinics are problems related to conduct, antisocial behaviors, and aggressiveness."[58]

Research also shows various stressors in adolescents are powerful triggers of violent behavior. The American Academy of Pediatrics has identified several risk factors that can trigger violence in adolescents including domestic violence, substance abuse by the parents or other family members, inappropriate supervision, exposure to violence in the home, and physical assault, among others.[59] Undoubtedly, these factors combined to trigger Chris Simmons' behavior, as he

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[56] *Ibid*., p. 54.

[57] Cole et al., *The Development of Children*, p. 624.

[58] Schwartzburg, *The Adolescent in Turmoil*, p. 109.

[59] American Society of Pediatrics, Policy Statement, "*The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and at the Community Level*," Pediatrics, Volume 103, Number 1, January 1999, pp. 173-181.

was subjected to violence and alcohol abuse by his stepfather on a daily basis throughout his childhood.

Of course, not all adolescents engage in substance use and/or violence. But, most of them engage in some form of delinquency. "The commission of illegal acts is more common during adolescence than during any other portion of the life course and this age-specific peak is widely distributed throughout the population. Estimates of the proportion of males who have been arrested before the age of 18 range between 25 percent and 45 percent."[60] Naturally, the number of offenders is much higher than the number arrested; almost all adolescents commit one or more illegal acts before turning eighteen.[61] This peak in criminal activity during adolescence is "quite stable across different social contexts" and present in all of the cultures studied to date.[62]

While it is apparent that juvenile delinquency is extremely common, it is more often than not *grown out of* by adolescents. "Wolfgan, Figlio, and Sellin's (1972) widely cited birth cohort study showed that nearly half of those ever

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[60] Graber et al., *Transitions through Adolescence*, p. 158.

[61] *Ibid*., p. 141, Straus, *Violence in the Lives of Adolescents*, p. 80, and Schwartzburg, *The Adolescent in Turmoil*, p. 109.

[62] Graber et al., *Transitions through Adolescence,* p. 141, and Lewis, *Child and Adolescent Psychiatry . . .*, p. 340.

arrested by the age of 18 were one-time offenders."[63] Of those who are career criminals, almost none initiated criminal or even antisocial behavior after adolescence, lending more support to the argument that adolescence is a time of self-centered destructiveness, risk-taking and impulsivity.[64]

2. The Same Death Penalty Jurisprudence That Supports the Exclusion of the Mentally Retarded From the Death Penalty Likewise Supports the Exclusion of Juveniles From the Death Penalty

Clearly, the research shows that the juvenile brain suffers from many of the same deficiencies as that of the mentally retarded. Most significantly to the issue of whether these two classes of people should be excluded from eligibility for the death penalty is the fact that both juveniles and the mentally retarded have measurable deficits in reasoning, judgment, and impulse control. Therefore, neither group acts with the same degree of moral culpability as fully functioning adults. *See* ***Atkins***, at 2244. Consequently, as the ***Atkins*** Court recognized, death penalty jurisprudence supports the exclusion of the mentally retarded from the death penalty. A look at the ***Atkins*** Court's reasoning shows that, in light of what

[63] Graber et al., *Transitions through Adolescence*, p. 158.

[64] *Ibid*., p. 148.

we know about the mental state of juveniles, the same reasoning applies to exclude them from the death penalty.

a. Use of the Death Penalty Against Juveniles Does Not Serve the Societal Purposes of Retribution and Deterrence.

In ***Gregg v. Georgia***, 428 U.S. 153, 183 (1976), the Court identified "'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." ***Atkins***, at 2251. "With respect to retribution -- the interest in seeing that the offender gets his 'just desserts' -- the severity of the appropriate punishment necessarily depends on the culpability of the offender." ***Id***. Thus, the Court has consistently narrowed the application of the death penalty to apply only to the most serious class of murders. Using this reasoning, the ***Atkins*** Court found that if the "average murderer" does not qualify for the death penalty, neither should the less culpable mentally retarded murderer. ***Id***. Following the Court's analysis to its only logical conclusion then, the less culpable juvenile murderer should also not qualify for the death penalty.

With respect to deterrence, the theory is that the severity of the sentence will persuade the would-be criminal to forego his murderous conduct. Rejecting the thought that the concept of deterrence would have an effect on the mentally retarded, the ***Atkins*** Court held:

> Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id. Again, as all of the research shows, juveniles are likewise less morally culpable due to similar cognitive and behavioral impairments. Therefore, it is unlikely that the notion of deterrence would have any effect on the potential juvenile offender either.

b. Juvenile Offenders Face an Unacceptable Risk of Wrongful Execution and Should Therefore be Ineligible for the Death Penalty

In addition to finding that the purposes of retribution and deterrence would not be served by subjecting the mentally retarded to the death penalty, the ***Atkins*** Court also found an unacceptable "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" ***Atkins***, at 2251 (quoting ***Lockett v. Ohio***, 438 U.S. 586, 605 (1978). The Court cited factors such as the possibility of false confessions, the lesser ability of mentally retarded

defendants to make a persuasive showing of mitigation and to provide meaningful assistance to their counsel, the fact that they are typically poor witnesses, and a demeanor that may wrongfully convey a lack of remorse, as contributing to the imposition of death sentences that may not be justified. ***Atkins***, at 2251-52.

These same factors apply to increase the possibility of unjustified death sentences being imposed on juveniles. The risk of false confessions is a significant problem that supports doing away with the juvenile death penalty. The same limitations that affect the ability of the mentally retarded to consider long-term consequences or defer to those in authority also apply to juveniles. For example, research findings consistently demonstrate that Miranda warnings are not well understood by juveniles.[65] One study found that juveniles had waived their rights to silence and counsel and made a statement regarding suspected felonies about 90 percent of the time, compared to approximately 60 percent of adults.[66]

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[65] Kaban, Barbara, and Tobey, Ann E., *When Police Question Children: Are Protections Adequate?*, Journal of the Center for Children and the Courts, 151 (1999).

[66] Grisso, Thomas and Pomicter, Carolyn, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 Law & Human Behavior 321 (1977).

Examples of juvenile offenders making false confessions to a murder abound. At age 16, Johnny Ross was convicted of rape and sentenced to death in Louisiana in 1975. ***State v. Ross***, 343 So.2d 722, 724 (La. 1977). Ross signed a waiver of his rights, and claimed that his subsequent written confession was coerced by police. ***Id***. at 724-25. In 1977, when the mandatory death penalty provision of Louisiana's aggravated rape statute was invalidated by the Supreme Court, his death sentence was vacated and the case was remanded with instructions to impose a twenty-year sentence. ***Id***. at 728. In 1980, tests revealed that his blood type did not match that of the sperm found in the victim.[67] Presented with this evidence and a federal habeas corpus petition, the New Orleans District Attorney agreed to his release in 1981.[68] This is just one example of the dozens of recent cases of juveniles making false confessions that have been overturned due to

[67] Bedau, Hugo Adam and Radalet, Michael, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford Law Review 21, 157 (1987).

[68] *Ibid*.

exonerating evidence.[69]

In some extraordinary cases, juveniles confessed to murders but were later exonerated because they were incarcerated at the time of the crime.[70] In another class of disturbing cases, police secured false confessions from

[69] *See, e.g.,* "Beale's Changing Statements," 6/4/01 Wash. Post A08 (6/4/01); April Witt, "FALSE CONFESSIONS: In Pr. George's Homicides, No Rest for the Suspects" Wash. Post A01 (6/4/01); Ken Armstrong, Maurice Possley and Steve Mills, "Officers ignore laws set up to guard kids: Detectives grill minors without juvenile officers, parents present," Chicago Tribune, December 18, 2001; Maurice Possley and Steve Mills; "Crime Lab Analysts Hit as Three Seek New Trials: Testimony Disputed in '86 Slaying Case," Chicago Tribune, January 27, 2001 at 5.

[70] *See, e.g.,* Steve Mills & Maurice Possley, "'Killer's in Jail When Crime Committed; Teen Accuses Cops of Coercing Him into Admitting Guilt, Chicago Tribune, April 29, 1998; Maurice Possley & Steve Mills, "When Jail is no Alibi in Murders" Chicago Tribune, 1 (12/19/01).

multiple juveniles while investigating a single homicide.[71] It is obviously well documented that the risk of false confessions from the mentally retarded should apply with equal force to juveniles to prohibit the execution of those under the age of 18.

Not surprisingly, some of the factors cited by the Court as contributing to an unjustified death sentence for the mentally retarded proved detrimental to Mr. Simmons' case. As a juvenile, Chris Simmons had very little in his background that is generally presented in mitigation, simply because he had not lived long enough to develop "typical" mitigation evidence -- positive work history,

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[71] *See, e.g.*, Michael D. Sorkin "Teens Cleared of Killing Homeless Man in Alton" St. Louis Post-Dispatch, p. 1A (7/17/90) (involving false confessions of four teens); Louis J. Rose, "3 Men Arrested, Released in National Case File," St. Louis Post-Dispatch, 9B (5/5/89) and Bill Smith & Carolyn Tuft "Other Counties are Not Immune to Making Mistakes, Convicting the Innocent" St. Louis Post-Dispatch (4/12/98) (re the case of teens Anthony Benn and Ricky Williams); Brian Wheeler, "Despite Confession, Grand Jury Indicts Another Man in Triple Shooting Case" The Capital (Annapolis, MD.) p. 16 (11/30/94) (involving false confession of Wardell W. Johnson, age 16); "Youth Cleared in Slaying" St. Louis Post-Dispatch 1A (1/27/89) (re the case of Dustan Pennington, age 16).

supportive father, meaningful relationships with friends and family. Basically, there was not a lot of "good" to say about Mr. Simmons because, as a child, he hadn't yet had an opportunity to do a lot of good. Conversely, defense counsel were not able to present the "bad" side of Chris Simmons -- his traumatic upbringing, mental illnesses and drug problems -- because Mr. Simmons' lack of insight and experience, and the fact that he had just been pulled out of an emotionally and physically abusive environment, prevented him from providing meaningful assistance to his counsel to uncover this important mitigating evidence.[72] Unlike the adult offender, who has at least some insight into his behaviors that landed him in the situation of facing a capital murder charge, Chris Simmons was at a loss to provide his counsel with any helpful information to steer counsel in the direction of the problems. The result was that Christopher Simmons' penalty phase lacked any substance and revealed nothing of the plethora of mitigating evidence that existed.

The ***Atkins*** Court also pointed out the danger that using mental retardation as a mitigating factor can be a "two-edged sword" that may actually support the aggravating factor of future dangerousness in the jury's eyes. ***Atkins***, at 2252. Indeed, Mr. Simmons suffered from the same "two-edged sword" when he

[72] A plethora of such information was later uncovered when an adequate investigation was done and when Mr. Simmons began to open up to a psychologist.

attempted to use his age as a mitigating circumstance. In closing argument, the state turned this "mitigator" around and argued that Chris Simmons' age was in fact an aggravator:

> As I told you yesterday, he used his age in committing this offense because he didn't believe that you would think that he was capable of it. Well, you do, and you have found it. Don't let him use his age to protect himself now, because then he wins.

(Trial Transcript, pp. 1136-37).

> Let's look at the mitigating circumstances. Let's look at that. He listed the mitigating circumstances. I don't have them in front of me here. Age, he says. Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.

(Trial Transcript, pp. 1156-57).

Based on all of the above factors, the Court concluded, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." ***Atkins***, at 2252. These same factors work to create such unacceptable "special risk" for juveniles.

3. Missouri Recognizes That Juveniles Do Not Possess the Same Mental Competency and Responsibility as Adults

This evidence of reduced culpability for juveniles does not create a novel argument in the State of Missouri. Indeed, many of our laws reflect the long-standing recognition of our responsibility to protect juveniles in ways that we do not legislate protection for adults. For example, Article VIII, §2, of the Missouri Constitution provides that Missourians must be 18 years old before they are granted the right to vote. Likewise, Missouri citizens must be 21 years old before they can serve on a jury.[73]

Our State's increasing recognition of the need to protect our juveniles was most recently seen in the driver's licenses' statutes. The statute originally granted the privilege to drive at the age of sixteen.[74] Effective January 1, 2001, a new statute was put in place, allowing children between the ages of sixteen and eighteen to obtain only an "intermediate driver's license."[75] Among other things, the "intermediate license" requires that the juvenile have a permit for 6 months before the license can be obtained, and verification of at least 20 hours of supervised driving experience under this permit.[76] Once the "intermediate license"

[73] Mo. Rev. Stat. §494.425(1) (1996).

[74] Mo. Rev. Stat. §302.060(2) (1994).

[75] Mo. Rev. Stat. §302.178 (2002).

[76] Mo. Rev. Stat. §302.178.1(3) and (4) (2002).

is issued, the juvenile is still not allowed to drive between 1 a.m. and 5 a.m. until he turns 18 and gets his ordinary driver's license.[77]

Other examples of Missouri statutes that seek to protect our children by restricting their rights are the marriage license statute, which requires parental consent to obtain a license for children under 18;[78] the pornography statute that makes it a crime to distribute pornography to minors under the age of 18;[79] and the state lottery statute that prohibits the sale of tickets to anyone under the age of 18.[80] Finally, our refusal to give children the right to consume alcohol or to purchase tobacco, are probably the clearest examples of our recognition that juveniles are not capable of acting with the same maturity and responsibility as adults.

4. Conclusion

The issue to be decided by this Court is whether the Missouri and/or Federal Constitutions prohibit imposition of the death penalty upon a juvenile under the evolving standards of decency in our society. Mr. Simmons' analysis of this issue

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[77] Mo. Rev. Stat. §302.178.2 (2002).

[78] Mo. Rev. Stat. §451.090.2 (1997).

[79] Mo. Rev. Stat. §573.040 (1995) prohibits the distribution of pornography to "minors," which §573.010(7) (2002) defines as "any person under the age of eighteen."

[80] Mo. Rev. Stat. §313.280 (2001).

adopts the reasoning in ***Atkins*** because both cases involve interpretation of the "cruel and unusual punishment clause" and because identical reasoning applies to provide such interpretation. In finding that the Constitution forbids the execution of the mentally retarded, the ***Atkins*** Court relied in part on the fact that the mentally retarded are less culpable than other offenders. Therefore, the death penalty does not serve the traditional purpose of retribution, because mentally retarded offenders are not the "worst of the worst" that the Court reserves the death penalty for. Likewise, the traditional purpose of deterrence is not satisfied, because mentally retarded offenders are not able to appreciate any deterrent effect. Furthermore, the reduced capacity of mentally retarded defendants puts them at an increased risk, for several reasons, that the death penalty will be wrongfully imposed.

Uncontroverted scientific evidence shows that juveniles are likewise less physically and emotionally developed and therefore less culpable than other offenders. Therefore, the traditional purposes of retribution and deterrence are also lost on juveniles. Furthermore, the reduced capacity of juveniles puts them at an increased risk that the death penalty will be wrongfully imposed. Any other conclusion would be contrary to the reasoning in ***Atkins***. Because the ***Atkins*** Court found these factors sufficient to hold that the Eighth Amendment to the Constitution forbids the execution of the mentally retarded, this Court is likewise

compelled to find that Article I, Section 21 of the Missouri Constitution, as well as the Eighth Amendment to the U.S. Constitution, prohibit the execution of juveniles.

C. BASED ON OBJECTIVE STANDARDS OF DECENCY THAT CURRENTLY PREVAIL, THE EXECUTION OF JUVENILES IS CONTRARY TO THE CRUEL AND UNUSUAL PUNISHMENT PROHIBITION OF ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

At the heart of the prohibition against cruel and unusual punishment is the idea that the punishment must be proportional to the crime. *See* ***Atkins***, at 2246-47. The definition of proportionality is found in the standards that currently prevail, not those in force at the time the Eighth Amendment took effect. ***Id***. at 2247. Exactly what standards prevail should be determined by "objective factors to the maximum possible extent." ***Id***. (citation omitted)

In applying this proportionality review to determine the unconstitutionality of executing the mentally retarded, the Court considered legislation as the "most reliable objective evidence of contemporary values." ***Id***. (citation omitted) In addition to reviewing the legislative trends, the Court considered the positions of organizations with germane expertise, of religious communities, of the world

community, and of the American public. ***Id***. at 2249, n. 21. Finally, the Court considered its own judgment on the issue. ***Id***. at 2247-48. In the end, the Court concluded that the practice of executing the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it." ***Id***. at 2249.

Using all of the same objective standards employed by the ***Atkins*** Court, it is evident that a national consensus has likewise developed against the execution of juveniles. A comparison of the prevailing views on the issue of executing the mentally retarded with those on the issue of executing juveniles shows that the consensus against the execution of juveniles is equal to if not greater than that against execution of the mentally retarded.

1. Legislation on the Issue of the Juvenile Death Penalty

At the time of ***Stanford v. Kentucky***, 492 U.S. 361 (1989), 11 states established 18 as the minimum age of eligibility for the death penalty, 4 states established 17 as the minimum age, and 22 states established age 16 as the cutoff. ***Id***. at 371. One state, New Hampshire, had conflicting statutes at the time, with one statute setting eligibility at age 17 and one at age 18. In ***Stanford***, the Court concluded that the legislation did not establish the degree of national consensus sufficient to declare the execution of a 16 or 17 year old to be cruel and unusual punishment.

In comparison, today 16 states have established 18 as the minimum age of death eligibility, 5 states have established 17 as the minimum age, and 17 states have established 16 as the minimum age.[81] No state has lowered the age of eligibility to either 16 or 17, despite the green light to do so in ***Stanford***. Instead, state legislatures have moved in precisely the opposite direction.[82]

Since ***Stanford***, five states have created new law forbidding the juvenile death penalty. Most recently, Indiana raised its statutory minimum age from 16 to 18 years old.[83] The Montana Legislature did the same thing in 1999.[84] When New York reinstated the death penalty in 1995, its statute set the minimum age at 18 for eligibility of the death penalty.[85] The State of Kansas' 1994 reenactment of the death penalty likewise set the minimum age for death penalty eligibility at 18.[86] Finally, the State of Washington abolished the juvenile death penalty in a

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[81] Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2002*, p. 8 (January 9, 2003). **Appendix Exhibit H**, pp. A64-A98.

[82] *Ibid.*

[83] S.426, 112th Leg., Reg. Sess., 2002 In. Laws.

[84] H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.

[85] N.Y. Crim. Proc. Law §400.27 (McKinney 2002).

[86] Kan. Crime. Code Ann. §21-4622 (Vernon 2001).

Washington Supreme Court ruling. ***State v. Furman***, 858 P.2d 1092, 1103 (Wash. 1993). Furthermore, the District of Columbia, the Military Courts, and the Federal Government all proscribe the death penalty for those under age eighteen.

In addition to the definitive action taken by these five states, all legislative efforts in other states show a trend towards abolition of the juvenile death penalty. In ***Brennan v. State***, 754 So.2d 1, 7 (Fla. 1999), Florida raised its minimum age for eligibility for the death penalty from 16 to 17 years old. Ten other states that currently use the death penalty are considering legislation to raise the minimum age for eligibility to 18: Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Carolina, and Texas. This is the most legislative attention the issue has been given in twenty years.[87]

Relying on the ***Atkins*** Court's pronouncement that <u>enacted</u> legislation is the "clearest and most reliable" evidence of modern values, respondent claims that "failure to enact such proposed legislation, at the least, demonstrates no such consensus for abolishing the death penalty for juvenile offenders."[88] First, while such proposed legislation may not qualify as the "clearest and most reliable," it is inarguably evidence that the "standards of decency" are evolving towards ending

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[87] Streib, Victor L., *The Juvenile Death Penalty Today . . .* , p. 7. **Appendix Exhibit H**, pp. A64-A98.

[88] *See* Return, p. 15.

the juvenile death penalty. Second, as detailed below, it is worth noting that it is not that the legislation "failed" in the states considering its enactment, but rather that such legislation was unable to move through the states' elaborate political processes before the legislative sessions ended.

Paired with the 12 states that do not permit capital punishment for persons of any age, a total of 28 states currently prohibit the execution of juvenile offenders, while 22 states allow such executions. This closely parallels the numbers on the mental retardation issue at the time of the ***Atkins*** decision, with 30 states prohibiting the execution of the mentally retarded compared to 20 jurisdictions permitting such executions. In ***Atkins***, these numbers prompted the Court to conclude:

> The large number of states prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 2249.

a. Consistency of the Trend Away From Executing Juveniles

In considering the importance of the legislative movement, the ***Atkins*** Court commented that "[i]t is not so much the number of these States that is significant,

but the consistency of the direction of change." ***Id***. at 2249. The large number of states banning executions of the mentally retarded "carries even greater force" when the overwhelming support such legislation received is considered. ***Id***.

A similarly large amount of support is seen in recent legislative efforts to abolish the juvenile death penalty. The Indiana legislation was passed by a vote of 44-3 in the Senate and 83-10 in the Assembly.[89] The Montana legislation passed by a margin of 44-5 in the Senate and 85-15 in the Assembly.[90] Even in Washington, where the action was accomplished by the Washington Supreme Court, all Justices of the Court concurred in the decision abolishing the juvenile death penalty. ***State v. Furman***, 858 P.2d 1092 (Wash. 1993).

In Florida, the bill[91] passed the Senate 34-0, but the House of Representatives did not vote on the measure by the end of the session. Even in Texas, the only state that executes juvenile offenders with any regularity, the bill[92] passed the House 72-42 before becoming stalled in the Senate without a vote. In

[89] Indiana State Legislature Archive (2002), 7/16/2002 SB 0426.

[90] Montana Legislative Archive (1999) Detailed Bill Information HB 374.

[91] SB 1212 (2002).

[92] H.J. of Tex., 77th Leg., R.S. page 3098 (2001).

New Hampshire, the legislature voted to abolish the death penalty completely in 2000, thereby necessarily including juveniles.[93]

Like the trend away from executing the mentally retarded, the efforts to end the executions of juveniles are receiving near unanimous support. This fact strengthens the impact of the position already taken by over half of the states outlawing the juvenile death penalty.

b. The Practice of Executing Juveniles Has Become "Unusual"

The second factor used by the ***Atkins*** Court to bolster the strong legislative stance against executing the mentally retarded is the fact that the practice of carrying out such executions is uncommon. ***Id***. at 2249. This factor also bolsters the case against executing juvenile offenders. Of the 22 states that retain the death penalty for juvenile offenders, only two have used this punishment with any frequency -- Texas and Virginia. These two states have carried out 16 of the 21 executions of juvenile offenders in the United States since 1976. Texas is responsible for 13 of the executions, and Virginia for 3.[94]

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[93] HB 1548.

[94] Streib, Victor L., *The Juvenile Death Penalty Today . . .* , p. 5 (Table 2). **Appendix Exhibit H**, pp. A64-A98.

Five other states have carried out only one such execution -- Georgia, Louisiana, Missouri[95], Oklahoma, and South Carolina.[96] Clearly, these states are not closely tied to the punishment. Before these modern day singular executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.[97]

This leaves 15 states that have not carried out a single juvenile execution, although permitted by law. Of these states, eight of them have no juvenile offenders on their death row, two states have one such offender, and four states have two.[98] As evidence of the continuing trend away from juvenile executions, in

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[95] Missouri's lone juvenile execution occurred on July 28, 1993, when the state executed Frederick Lashley. Furthermore, of the 224 juveniles sentenced to death in this nation since 1973, only 4 of those sentences have occurred in Missouri. Streib, Victor L., *The Juvenile Death Penalty Today* . . ., p. 12 (Table 5). **Appendix Exhibit H**, pp. A64-A98.

[96] Streib, Victor L., *The Juvenile Death Penalty Today* . . ., p. 4 (Table 1). **Appendix Exhibit H**, pp. A64-A98.

[97] Streib, Victor L. *Death Penalty for Juveniles* (Indiana University Press 1987).

[98] The American Bar Association. *Fact Sheet: The Juvenile Death Penalty in the United States* (July 2002). **Appendix Exhibit I**, pp. A99-A101.

the last year, Virginia overturned the death sentence of its only juvenile on death row.[99] On January 6, 2003, the Governor of the State of Mississippi issued a stay of execution for Ron Chris Foster, who was scheduled to be executed on January 8, 2003. The Governor's Executive Order cited questions about whether ***Atkins*** would apply to preclude the execution and referred to the possibility of a Supreme Court decision on the Constitutionality of executing juveniles.[100] Foster was 17 years old at the time of his crime. Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 85%,[101] and juvenile death sentences have dropped in 2002 to only 2% of the total number of death sentences imposed in the United States since 1973.[102]

What these statistics show is that in the states that do retain the juvenile death penalty, there is little need to pursue legislation barring such executions

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[99] Washington Post, 9/25/01. From the Death Penalty Information Center at www.deathpenaltyinfo.org.

[100] State of Mississippi, Office of the Governor, Executive Order No. 871, January 6, 2003. **Appendix Exhibit J**, pp. A102-A103.

[101] Streib, Victor L., *The Juvenile Death Penalty Today . . . ,* p. 9. **Appendix Exhibit H**, pp. A64-A98.

[102] *Ibid*, p. 13. **Appendix Exhibit H**, pp. A64-A98.

because it is not much of an issue. The Court recognized this fact in ***Atkins***, and after noting that the execution of the mentally retarded is uncommon, recognized that "there is little need to pursue legislation barring the execution of the mentally retarded in those States [that do allow such executions]." ***Atkins***, at 2249. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change may be high.

2. Other Objective Factors Support the Legislative Trends Away From Sanctioning Use of the Juvenile Death Penalty

After considering legislative support for abolishing the death penalty for mentally retarded offenders, the ***Atkins*** Court looked at "[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social and professional consensus." ***Atkins***, at 2249, n. 21. Examining that same additional evidence as it relates to the juvenile death penalty reveals a similar consensus against the use of this punishment.

a. <u>Organizations With Germane Expertise Have Adopted Official Positions Opposing the Imposition of the Death Penalty Upon a Juvenile Offender</u>

Opposition to the juvenile death penalty by expert organizations has been longstanding. In his ***Stanford*** dissent, Justice Brennan cited the following

organizations, among others, that filed *amicus* briefs urging an end to juvenile executions:

> American Bar Association, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, Defense for Children International - USA, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, Office of Capital Collateral Representation for the State of Florida, International Human Rights Law Group, and Amnesty International.

Stanford, 492 U.S. at 389, n.4.

Since ***Stanford***, the list of such organizations has continued to grow. The Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues, established a blue-ribbon committee

to develop reforms to address wrongful convictions in death penalty cases.[103] In its publication *Mandatory Justice, Eighteen Reforms to the Death Penalty*, the group explicitly recommended barring the death penalty for persons under the age of 18 at the time of the crime to reduce the risk of wrongful execution, ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty.[104] The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center For

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[103] The 30-member Death Penalty Initiative committee describes itself in its mission statement: "We are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as journalists, scholars, and other concerned Americans. We may disagree on much. However, we are united in our profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished."

[104] The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty*, p.11 (2001). **Appendix Exhibit K**, pp. A104-A140. (relevant pages 1-16 of the publication are contained in the Appendix. The full text can be found at www.constitutionproject.org.)

Youth Law, The Coalition for Juvenile Justice, and The American Humane Association have all joined this position and support the abolition of the juvenile death penalty.

b. Widely Diverse Religious Communities Oppose the Juvenile Death Penalty

The ***Atkins'*** Court commented on the number of different religions that filed *amicus* briefs in support of stopping executions of the mentally retarded. ***Atkins***, at 2249, n.21. Religious opposition to the juvenile death penalty dates back at least to the time of ***Stanford***, where the following groups filed *amicus* briefs advocating an end to executing juveniles:

> American Baptist Church, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

Stanford, 492 U.S. at 389, n. 4.

Since that time, several additional groups of faith have issued statements in opposition to the death penalty in general, including:

> Central Conference of American Rabbis, Church of the Brethren, The Episcopal Church, Fellowship of Reconciliation, Friends United Meeting, The Moravian Church in America, Reformed Church in America, American Ethical Union, The Bruderhof Communities, Church Women United, Evangelical Lutheran Church in America, Friends Committee on National Legislation, General Conference of General Baptists, YWCA of the USA, The Orthodox Church in America, The Rabbinical Assembly, Reorganized Church of Jesus Christ of Latter Day Saints, and Unitarian Universalist Association.[105]

c. The World Community Overwhelmingly Opposes the Execution of Juveniles

i. The International Bar on Juvenile Executions Has Attained *Jus Cogens* Status as Detailed by the Court in *Domingues*

[105] The text of each of these statements can be found at the Religious Organizing Against the Death Penalty Website at www.deathpenaltyreligious.org/education.html.

The execution of juvenile offenders has all but ended in every nation except the United States.[106] Although domestic differences are small between the statutory bars on executing mentally retarded and juvenile offenders, the juvenile bar has so much more universal, codified support that it has achieved customary international law and, indeed, *jus cogens* status. Indeed, such status was recently recognized in the October 22, 2002, opinion of the Inter-American Commission on Human Rights in the case of Michael Domingues, a Nevada inmate sentenced to death for an offense that occurred when he was 16 years old.[107] The Commission held that the customary international law bar on the death penalty for crimes committed by persons under age 18 has attained *jus cogens* status. ***Domingues***, at para. 112. That means, succinctly, that the Commission found the United States (and Missouri implicitly in Mr. Simmons' case) to be violating a "superior order of legal norms" derived from "fundamental values held by the international community," the breach of which "shock the conscience of humankind," and which "bind the international community as a whole, irrespective of protest,

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[106] Amnesty International, Death Penalty Facts. *Juveniles: The Death Penalty Gives Up on Juvenile Offenders* (2002). **Appendix Exhibit L**, pp. A141-A142.

[107] Inter-American Commission on Human Rights, Organization of American States, Report No. 62/02, Merits Case 12.285, ***Michael Domingues, United States***, October 22, 2002. *See* **Appendix Exhibit M**, pp. A143-A187.

recognition or acquiescence." ***Id***. at para. 49. Unlike the practice of seeking the death penalty for persons with mental retardation, Missouri's use of the death penalty for juvenile offenders is not only inconsistent with international practice, but with the most fundamental of international law peremptory norms. ***Id***. The Commission's decision is the first by any international court, commission, or other international body responsible to interpret and apply international human rights norms that has held the bar on the juvenile death penalty to meet the *jus cogens* definition. The Commission's decision at the very least should be persuasive authority for this Court's treatment of the issue, constituting a significant fact in itself that was not available to Chris Simmons when he filed his state and federal appeals.

In the alternative, a persuasive argument can be made that the Inter-American Commission's decision in ***Domingues*** is in fact *legally binding* on the United States (and Missouri), based upon the United States' treaty responsibilities under the Charter of the Organization of American States. The United States was a founding member of the Organization of American States (OAS) and an active participant in the 1948 conference at which both the OAS Charter and the American Declaration on the Rights and Duties of Man were adopted. Since that time, the United States has participated in each step of the development of the Inter-American system of human rights. The Inter-American system of human

rights enforcement and promotion is central to the role of the OAS, and the Commission and the American Declaration are integral parts of that system. The United States ratified the OAS Charter in 1951.[108]

The Inter-American Commission was created in 1959 as an autonomous entity of the OAS to promote and protect human rights. In 1967, amendments to the OAS Charter made the Commission a principal organ through with the OAS was to accomplish its purposes. Amended Charter, Art. 51.[109] The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." ***Id***. at Art. 112. The United States signed the amendments to the OAS Charter in 1967 and ratified them without reservation in 1968.[110]

Thus, with the full consent and ratification of the United States, the Commission acquired an express role under the OAS Charter to promote and

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[108] 2 U.S.T. 2349, T.I.A.S. No. 2361, 119 U.N.T.S. 3. Also available at www.oas.org/juridico/english/charter.html. The United States ratified the OAS Charter subject to one reservation that is not relevant here.

[109] The Charter was amended pursuant to the Protocol of Buenos Aires, 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847, Feb. 27, 1970.

[110] *See* 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847.

protect human rights within the Inter-American system. In addition, the United States consented to the Commission's power to hear individual petitions against OAS member states and to determine whether human rights protected by the American Declaration have been violated.[111] As a consequence, the United States

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[111] The United States has acknowledged and consented to the Commission's authority to adjudicate disputes involving member states' adherence to the Inter-American system of human rights, including specifically the Article of the American Declaration found to have been violated in ***Domingues***. ***Domingues***, at para. 112 (the *jus cogens* norm as reflected in Article I, protecting the right to life). The federal government has admitted that:

> under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the [American] Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, *inter alia*, by responding to petitions presented against it on the basis of the Charter and the Declaration.

has recognized the Commission's authority to promote and protect the human rights that the United States is treaty-bound not to infringe. It would be contrary to the treaty -- in this case the OAS Charter -- for the United States (and/or Missouri) to undermine the Commission by refusing to give effect to its findings that the American Declaration has been violated in the ***Domingues*** case and identically situated inmates. As noted in ***Domingues***, the Commission has determined that "the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights." ***Domingues***, at para. 30 ("Commission's Competence") & n. 14 (citing Commission decisions).

ii. Every Other Nation in the World has Stopped or is Stopping Juvenile Executions

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the United Nations Convention on the Rights of the Child (CRC) expressly prohibit the death penalty for juvenile

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Andrews v. United States, Case 11.139, Inter-Am.C.H.R. 570; OEA/ser.L/VI/II.98, doc 7 rev. (1996); *see also* ***Roach & Pinkerton v. United States***, Case 9647, Inter-Am.C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

offenders.[112] Until recently, the United States and Somalia were the only two countries that had failed to ratify the CRC. However, on May 9, 2002, Somalia, which had not had a working central government for more than a decade, signed the CRC. At the United Nations General Assembly Special Session on Children, Somalia also stated its intention to ratify the Convention.[113] When it does so, it will be the 192nd state party, and the United States will be the only country not to have adopted the norm against juvenile executions through ratification of the

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[112] In its Return, respondent contends that even before petitioner committed his crime he was on notice that several international treaties had been entered into that prohibited the execution of juveniles. (Return, p. 11) Therefore, this basis for relief was available, yet not raised by petitioner, in his previous appeals according to respondent. (Return, p. 11) Obviously, this ignores the fact that prior to the recognition of the importance of international norms in ***Atkins***, the Court had rejected such factors as relevant to the determination of the evolving standards of decency in ***Stanford***. Therefore, until ***Atkins***, invoking the treaty protections would have been in direct conflict with Supreme Court precedent.

[113] Amnesty International. *United States of America, Indecent and internationally illegal: The death penalty against child offenders* (Abridged Version) (September 2002, at 24). **Appendix Exhibit N**, pp. A188-A220.

treaty.[114] At the special session, the U.S. government nevertheless described itself as "the global leader in child protection."[115] Somalia's action, which came too late for inclusion in the Inter-American Commission's decision, only enhances the Commission's finding that "the extent of ratification of his instrument alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age." ***Domingues***, at para. 57.

In the past five years, the United States has executed 12 juvenile offenders, Texas being responsible for 8 of them. In contrast, the rest of the world combined has executed only 5 juveniles in this time frame.[116] Since 1990, only seven countries are reported to have executed prisoners who were under 18 years of age at the time of the crime -- The Democratic Republic of Congo, Iran, Nigeria, Pakistan, Yemen, Saudi Arabia, and the United States. The nations of Pakistan and Yemen have since abolished the juvenile death penalty, while Saudi Arabia and Nigeria deny that they have executed juvenile offenders. After eliminating the

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[114] Amnesty International, *The Death Penalty Worldwide* (2002).

[115] *Ibid*.

[116] Amnesty International, Death Penalty Facts. *Juveniles: The Death Penalty Gives Up on Juvenile Offenders*. **Appendix Exhibit K**, pp. A104-A140.

juvenile death penalty by statute, Pakistan commuted the death sentences of 74 juvenile offenders on July 25, 2002.[117]

In the last three years, the number of nations that execute juvenile offenders has dropped significantly to only three: Iran, the Democratic Republic of Congo, and the United States. Moreover, just this past year, Iran stated that it no longer executes juvenile offenders, and the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders and recently established a moratorium on executions.[118]

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[117] *See* ***74 Get Relief Against Death Sentence***, Pakistan News Service, July 25, 2002. **Appendix Exhibit O**, p. A221. This action by Pakistan is illustrative of the fact that the *jus cogens* right to life of juvenile offenders is being protected even in countries that otherwise have very serious records of violation of fundamental human rights. *See* Munir Ahmad, Rights Group: 461 Pakistani Women Killed, Associated Press, December 11, 2002 (describing the "honor killings" of women in Pakistan as reported by the Human Rights Commission of that country: "women are murdered to protect the 'family honor' for immoral behavior ranging from sex outside marriage, dating, talking to men, being raped or even cooking poorly.").

[118] Amnesty International, Death Penalty Facts. *Juveniles: The Death Penalty Gives Up on Juvenile Offenders*. **Appendix Exhibit K**, pp. A104-A140.

Other countries recently taking a stand against juvenile executions include the Philippines and China. On July 30, 2002, the Philippines Supreme Court commuted the sentences of 12 juvenile offenders. The Court reasoned as follows:

> Apparently they were all below 18 years old at the time they supposedly committed their respective offenses. Nevertheless, after trial, the different trial courts hearing their respective cases found all of them guilty of capital offenses and sentenced them to the supreme penalty of death. Under Article 68, The Revised Penal Code, in relation to P.D. 603, as amended, minority is a privileged mitigating circumstance which prevents the imposition of the death penalty.

Resolution of the Court En Banc, Luzviminda Puno, Clerk, Supreme Court of the Philippines, O.C. No. 01-20, *Re: Letter of Ma. Victoria S. Diaz, Program Development Officer, Jesuit Prison Service*, dated July 30, 2002, filed August 1, 2002, at 1.

Finally, on September 3, 2002, a court in China sentenced two teenagers to life imprisonment for an act of arson that killed 25 people, sparing them the death

penalty because of their age at the time of the crime.[119] China, the world leader in executions, eliminated the juvenile death penalty by statute some years ago.[120]

In an age of increasing global cooperation in areas ranging from travel and trade to common security and defense, continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing a consensus against the execution of juveniles.

d. Public Opinion Shows a Consensus Among Americans that We Should Not Be Executing Our Children

Scientific studies confirm that the majority of Americans believe that the

[119] Amnesty International. *United States of America, Indecent and internationally illegal: The death penalty against child offenders* (Unabridged Version) (September 2002, at 83)(citing Associated Press, September 4, 2002).

[120] Amnesty International. *United States of America, Indecent and internationally illegal: The death penalty against child offenders* (Abridged Version) (September 2002, at 24). **Appendix Exhibit N**, pp. A188-A220.

death penalty should not apply to juveniles.[121] In one study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty.[122] More recent studies substantiate this trend. A 2001 study showed that "while 62% back the death penalty in general, just 34% favor it for those committing murder when under the age of 18."[123] The same study cites a 2001 survey by the Princeton Survey Research Associates, which showed that 72% favored the death penalty for at least the most serious murders, but only 38% wanted it applied to juveniles under 18.[124] Similarly, a May 2002 Gallup poll showed that 69% of Americans oppose the practice of executing juveniles.[125]

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[121] *See, e.g.*, Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. *Crime and Delinquency*, October 1989 v35 n4 pp546-561.

[122] Finkel, N.J., Hughes, K.C., Smith, S.F., & Hurabiell, M.L., "Killing kids: The juvenile death penalty and community sentiment." *Behavioral Sciences and the Law*, 12, 5-20 (1994).

[123] Smith, Tom W., "Public Opinion of the Death Penalty for Youths." National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p. 2 (December 2001).

[124] *Ibid*.

[125] Gallup News Service, "Slim Majority of Americans Say Death Penalty Applied Fairly," (May 20, 2002).

When the National Opinion Research Center study looked at the Midwest, it revealed an even smaller number of Midwesterners supportive of the juvenile death penalty than the nation's population as a whole. While 59.9% of the Midwest supported the death penalty, only 31.5% came down in favor of supporting the juvenile death penalty.[126] Indeed, with Indiana's recent statute repealing the death penalty, Missouri is the lone Midwestern state with the juvenile death penalty on its statute books.

Public opinion is also revealed in the actions of juries. In the mid to late 1990s, the rate of juvenile death penalty sentencing ranged from approximately 3% to 5%. In 2002, only four juvenile death sentences were verified (or 2.6% of the total number of death sentences.)[127] These statistics demonstrate that not only is the public opposed in theory to the execution of juveniles, but they often in practice refuse to execute a juvenile offender. Indeed, in Missouri the last juvenile death sentence was that handed down to Christopher Simmons over eight years ago.

3. Conclusion

Under the current objective standards that prevail today, there is clearly a national consensus against executing juveniles. A look at all of the standards

[126] *Ibid*., p. 8 (Table 3).

[127] Streib, Victor L., *The Juvenile Death Penalty Today* . . . , p. 11.

employed by the ***Atkins*** Court shows that this consensus is comparable to, if not stronger than, that against the execution of the mentally retarded. Furthermore, such consensus as to juveniles appears to be longer standing in many respects than the more recent wave of opposition to executing the mentally retarded. To conclude that these standards of decency prohibit the execution of the mentally retarded, but that the same standards do not prohibit the execution of juveniles would be a blatantly inconsistent application of the law. Therefore, based upon ***Atkins***, this Court is compelled to conclude that the execution of juvenile offenders violates the Missouri and the United States Constitutions.

D. EACH OF THE FACTORS CONSIDERED BY ***ATKINS*** APPLY WITH EQUAL OR GREATER FORCE TO WARRANT ABOLITION OF THE JUVENILE DEATH PENALTY

Only two states, Texas and Virginia, even remotely embrace the juvenile death penalty. Even Texas, which has accounted for over half of the modern era juvenile executions, now shows a strong trend in the other direction by easily passing a ban on juvenile executions through their House last year.

In comparison to the execution of the mentally retarded, which is now illegal, executions of juvenile offenders is *less* frequent and *less* widespread. Since 1976, 24 persons with mental retardation were executed, while 19 juveniles were

executed during the same period.[128] 10 states have carried out at least one execution of the mentally retarded, while 7 states have executed juveniles. 7 states have carried out two or more executions of the mentally retarded, while only 2 states have done so of juvenile offenders. Under these circumstances, if our current standards of decency prohibit the execution of the mentally retarded, they also prohibit the execution of juveniles. The ***Atkins*** Court's conclusion that the execution of the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it," ***Atkins***, at 2249, applies equally to the issue of juvenile executions.

This consensus against executing juveniles is easy to understand in light of the physical and emotional deficiencies of juveniles, which makes them unable to act with the same degree of moral culpability as normally functioning adults. Significantly, modern research shows that the very part of the brain that controls impulses, regulates our thoughts, and intervenes to stop inappropriate behavior has not developed in adolescents. It is exactly these deficiencies in the mentally retarded -- lack of reasoning, judgment, and impulse control -- that prompted the ***Atkins*** Court to hold the execution of the mentally retarded unconstitutional. ***Atkins***, at 2244. Statistics show that opposition to the juvenile death penalty has been long-standing and continues to grow. Now that scientific research has

[128] Death Penalty Information Center, www.deathpenaltyinfo.org.

established that juveniles are in fact less culpable than other offenders, this Court should take the next step and implement the will of this State and the nation by declaring the juvenile death penalty to be a violation of the cruel and unusual punishment clause.

CONCLUSION

Based upon all of the foregoing reasons, petitioner Christopher Simmons requests that this Court order that he be discharged from his sentence of death and that a sentence of life imprisonment without parole be imposed.

RESPECTFULLY SUBMITTED,

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CERTIFCATE OF COMPLIANCE

I, Jennifer Brewer, hereby certify that:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word 97, in Times New Roman size 14 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 17,284 words, which does not exceed the 31,000 words allowed for a petitioner's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using Norton AntiVirus 2003 program. According to that program, the disk is virus-free.

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Jennifer Brewer

CERTIFICATE OF MAILING

I, Jennifer Brewer, certify that on January 17, 2003, two true and correct copies of the Petitioner’s Brief and a floppy disk containing a copy of this brief were mailed by UPS overnight mail to Stephen D. Hawke, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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